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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JOANIE B. BOYER,	)	NO. EDCV 07-0058-CT
	)	
Plaintiff,	)	OPINION AND ORDER
	)	
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of	)	
Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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For the reasons set forth below, it is ordered that the matter be **REMANDED** pursuant to sentence four of 42 U.S.C. Section 405(g) to defendant Commissioner of Social Security ("the Commissioner") for further administrative action consistent with this opinion and order.

SUMMARY OF PROCEEDINGS

On February 16, 2007, plaintiff, Joanie B. Boyer ("plaintiff"), filed a complaint seeking judicial review of the denial of benefits by the Commissioner pursuant to the Social Security Act ("the Act"). The parties filed a consent to proceed before the magistrate judge. On May 29, 2007, plaintiff filed a memorandum of points and authorities in support of remand or reversal. On June 29, 2007, the

1 Commissioner filed a brief in opposition to the relief requested in  
2 the complaint.

3 SUMMARY OF ADMINISTRATIVE RECORD

4 1. Proceedings

5 In 2002 plaintiff filed an application for Supplemental Security  
6 Income ("SSI"), alleging disability since December 1, 2001 due to  
7 back, knee and shoulder problems, neck pain, heart murmur, eye  
8 problems, psychiatric medication problems and Graves disease. (TR 36,  
9 117).<sup>1</sup> The application was denied initially and upon  
10 reconsideration.<sup>2</sup> (TR 19, 31-35, 38-42).

11 Plaintiff filed a request for a hearing before an administrative  
12 law judge ("ALJ"). (TR 43). On March 24, 2004, plaintiff,  
13 represented by an attorney, appeared and testified before an ALJ. (TR  
14 657-76). On June 23, 2004, the ALJ issued a decision that plaintiff  
15 was not disabled, as defined by the Act, and thus was not eligible for  
16 benefits. (TR 24-26). On July 7, 2004, plaintiff filed a request  
17 with the Social Security Appeals Council to review the ALJ's decision.  
18 (TR 56). On August 25, 2004, the Appeals Council remanded the case  
19 to the ALJ with a directive to obtain available updated treatment  
20 records, to address all relevant lay statements and testimony, address  
21 the medical opinion evidence of record, including opinions from State  
22 Agency sources, obtain a consultative mental status examination with  
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24 <sup>1</sup> "TR" refers to the transcript of the record of  
25 administrative proceedings in this case and will be followed by  
the relevant page number(s) of the transcript.

26 <sup>2</sup> The administrative record contains material relating to  
27 a prior application filed in 2001. That application was denied  
in April of 2001. (TR 18, 113).

1 psychological testing and, if warranted by the expanded record, to  
2 obtain evidence from a vocational expert. (TR 59-60).

3 On February 7, 2006, plaintiff, again represented by an attorney,  
4 appeared and testified before an ALJ at a second hearing. (TR 677-  
5 88). The ALJ also considered vocational expert ("VE") testimony. On  
6 September 1, 2006, the ALJ issued a subsequent decision that plaintiff  
7 was able to perform light work, but could climb, stoop, kneel and  
8 crouch only occasionally. (TR 14). Given this residual functional  
9 capacity ("RFC") and even with a limitation to simple, repetitive and  
10 routine tasks, the ALJ found that there were thousands of jobs  
11 plaintiff could perform and plaintiff was, therefore, not disabled,  
12 as defined by the Act. (TR 15-16). On September 12, 2006, plaintiff  
13 filed a request with the Social Security Appeals Council to review the  
14 ALJ's decision. (TR 8). On December 8, 2006, the request was denied.  
15 (TR 5). Accordingly, the ALJ's decision stands as the final decision  
16 of the Commissioner. Plaintiff subsequently sought judicial review  
17 in this court.

## 18 2. Summary Of The Evidence

19 The ALJ's decision is attached as an exhibit to this opinion and  
20 order and, except as otherwise noted, materially summarizes the  
21 evidence in the case.

### 22 PLAINTIFF'S CONTENTIONS

23 Plaintiff contends as follows:

- 24 1. The ALJ failed to properly comply with the Appeals Council Order  
25 requiring that he consider the state agency findings;
- 26 2. The ALJ failed to properly consider treating psychiatrist Thuy  
27 Huynh Nguyen's opinion of disability;

- 1 3. The ALJ failed to properly consider the severity of plaintiff's
- 2 mental impairment;
- 3 4. The ALJ failed to properly consider the side effects of
- 4 plaintiff's medication; and,
- 5 5. The ALJ failed to pose a complete hypothetical question to the
- 6 vocational expert.

#### 7 STANDARD OF REVIEW

8 Under 42 U.S.C. §405(g), this court reviews the Commissioner's  
9 decision to determine if: (1) the Commissioner's findings are  
10 supported by substantial evidence; and, (2) the Commissioner used  
11 proper legal standards. Macri v. Chater, 93 F.3d 540, 543 (9th Cir.  
12 1996). Substantial evidence means "more than a mere scintilla,"  
13 Richardson v. Perales, 402 U.S. 389, 401 (1971), but less than a  
14 preponderance. Sandgate v. Chater, 108 F.3d 978, 980 (9th Cir.  
15 1997).

16 When the evidence can reasonably support either affirming or  
17 reversing the Commissioner's conclusion, however, the Court may not  
18 substitute its judgment for that of the Commissioner. Flaten v.  
19 Secretary of Health and Human Services, 44 F.3d 1453, 1457 (9th Cir.  
20 1995). The court has the authority to affirm, modify, or reverse  
21 the Commissioner's decision "with or without remanding the cause for  
22 rehearing." 42 U.S.C. §405(g). Remand is appropriate where  
23 additional proceedings would remedy defects in the Commissioner's  
24 decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989).

#### 25 DISCUSSION

##### 26 1. The Sequential Evaluation

27 A person is "disabled" for the purpose of receiving social  
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1 security benefits if he or she is unable to "engage in any substantial  
2 gainful activity by reason of any medically determinable physical or  
3 mental impairment which can be expected to result in death or which  
4 has lasted or can be expected to last for a continuous period of not  
5 less than 12 months." 42 U.S.C. §423(d)(1)(A).

6 The Commissioner has established a five-step sequential  
7 evaluation for determining whether a person is disabled. First, it  
8 is determined whether the person is engaged in "substantial gainful  
9 activity." If so, benefits are denied.

10 Second, if the person is not so engaged, it is determined whether  
11 the person has a medically severe impairment or combination of  
12 impairments. If the person does not have a severe impairment or  
13 combination of impairments, benefits are denied.

14 Third, if the person has a severe impairment, it is determined  
15 whether the impairment meets or equals one of a number of "listed  
16 impairments." If the impairment meets or equals a "listed impairment,"  
17 the person is conclusively presumed to be disabled.

18 Fourth, if the impairment does not meet or equal a "listed  
19 impairment," it is determined whether the impairment prevents the  
20 person from performing past relevant work. If the person can perform  
21 past relevant work, benefits are denied.

22 Fifth, if the person cannot perform past relevant work, the  
23 burden shifts to the Commissioner to show that the person is able to  
24 perform other kinds of work. The person is entitled to benefits only  
25 if the person is unable to perform other work. 20 C.F.R. § 416.920;  
26 Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).

27 2. Issues

A. Consideration of Medical Opinion Evidence (Issues 1, 2, and 3)

Plaintiff contends that the ALJ failed to comply with the Appeals Council's directive to properly consider the opinions of the state agency physicians and plaintiff's treating psychiatrist, Dr. Thuy Huynh Nguyen, in determining that plaintiff does not have a severe mental impairment.

A severe impairment or combination of impairments is one which significantly limits the physical or mental ability to perform basic work activities. 20 C.F.R. § 416.920(c); see also 20 C.F.R. § 416.921(b) (describing basic work activities). Significantly, plaintiff is not required to establish total disability at this level of the evaluation. Rather, the severe impairment requirement is a threshold element which plaintiff must prove in order to establish disability within the meaning of the Act. Bowen v. Yuckert, 482 U.S. 137, 146 (1987); see also Webb v. Barnhart, 433 F.3d 683, 687 (9<sup>th</sup> Cir. 2005) ("Step two, then, is "'a de minimus screening device [used] to dispose of groundless claims.'" (citing Smolen v. Chater, 80 F. 3d 1273, 1290 (9<sup>th</sup> Cir. 1996))). An impairment will be considered non-severe when medical evidence establishes only a "slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on the individual's ability to work even if the individual's age, education, or work experience were specifically considered." Social Security Ruling ("SSR") 85-28; <sup>3</sup> Bowen v.

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<sup>3</sup>Social Security Rulings do not have the force of law. Paxton v. Secretary of Health & Human Servs., 856 F.2d 1352, 1356 (9<sup>th</sup> Cir. 1988). Nevertheless, Social Security Rulings constitute the Social Security Administration's interpretation of

1 Yuckert, 482 U.S. at 154 n.12. "[A]n ALJ may find that a claimant  
2 lacks a medically severe impairment or combination of impairments only  
3 when his conclusion is 'clearly established by medical evidence.'" Webb v. Barnhart, 433 F.3d at 687 (citing SSR 85-28).

4  
5 Here, the ALJ found that "there are no more than mild to slight  
6 mental functional limitations and these do not support the finding of  
7 a 'severe' mental impairment." (TR 15). The ALJ relied on the  
8 assessment by the consultative psychiatric examiner, Dr. Linda Smith,  
9 who conducted a mental assessment of plaintiff on December 15, 2005.  
10 (See TR 615-22). Dr. Smith conceded that she was not given any  
11 records to review prior to the examination and her assessment was  
12 based solely on the examination. (TR 615). Dr. Smith found that  
13 plaintiff has major depression, which had improved, and a mild panic  
14 disorder. (TR 620). Dr. Smith concluded that plaintiff's mental  
15 impairment caused no more than mild limitations in workplace  
16 functioning. (TR 621-22). The ALJ does not reference any other  
17 medical opinion concerning plaintiff's mental impairment in the 2006  
18 decision.

19 In the Appeals Counsel's remand order after the ALJ's first 2004  
20 decision, the Appeals Council directed the ALJ to consider all medical  
21 opinion evidence, including the findings of the state agency  
22 physicians. (TR 59-60, 492-498).

23 State agency medical consultants are "highly qualified

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25 the statute it administers and of its own regulations, and they  
26 are binding on ALJs. Quang Van Han v. Bowen, 882 F.2d 1453, 1457  
27 n.6 (9th Cir. 1989) (citation omitted). Courts defer to Social  
28 Security Rulings unless they are plainly erroneous or  
inconsistent with the Social Security Act or the Commissioner's  
regulations. Quang Van Han v. Bowen, 882 F.2d at 1458.

1 physicians" who are also "experts in Social Security disability  
2 evaluation." 20 C.F.R. § 416.927(f)(2). "Findings of fact made by  
3 State agency medical and psychological consultants . . . regarding the  
4 nature and severity of an individual's impairment(s) must be treated  
5 as expert opinion evidence of nonexamining sources." SSR 96-6p. ALJs  
6 "may not ignore these opinions and must explain the weight given to  
7 these opinions in their decisions." Id.; see also 20 CFR §  
8 416.927(f)(2).

9 Here, the state agency psychiatrist, who reviewed plaintiff's  
10 records in December of 2002, found that plaintiff was "moderately  
11 limited" in her ability to: (1) understand, remember and carry out  
12 detailed instructions, (2) maintain attention and concentration for  
13 extended periods, (3) complete a normal workday and workweek without  
14 interruptions and perform work at a consistent pace, (4) *interact*  
15 *appropriately with the public*, and (5) respond appropriately to  
16 changes in the work setting. (TR 492-93)(emphasis added). The state  
17 agency psychiatrist further found that plaintiff had moderate  
18 difficulties in maintaining social functioning and in maintaining  
19 concentration, persistence and pace and was "capable of performing  
20 simple, repetitive tasks w/*limited public contact*." (TR 494)(emphasis  
21 added). This finding was affirmed by a state agency psychiatrist at  
22 the reconsideration level. (TR 494, 495, 498).

23 The ALJ did not mention these opinions in his 2004 or 2006  
24 decisions as required by SSR 96-6p and, as discussed above, relied  
25 solely on the opinion of the consultative examiner who did not review  
26 plaintiff's medical records. The ALJ did refer to the fact that the  
27 VE testified that plaintiff could perform "thousands of jobs" given  
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1 a hypothetical that included a limitation to simple, repetitive tasks.  
2 (TR 15, 685-86). However, the hypothetical did not include the  
3 limitation regarding contact with the public and the jobs cited by the  
4 VE all include public contact. (See Dictionary of Occupational Titles  
5 ("DOT") No. 211.462-026 [check cashier] (includes jobs involving  
6 cashing checks, preparing money orders and receiving payment for  
7 utilities bills for customers and collecting and recording fees for  
8 check cashing servicing); No. 237.367-022 [information clerk] (involves  
9 answering inquiries from the public); and, No. 915.473-010 [parking  
10 lot attendant] (involves taking tickets and payment from customers who  
11 are parking their cars)). In addition, the job of check cashier has  
12 a specific vocational preparation ("SVP") level of 3, which requires  
13 over a month and up to three months of vocational preparation, see  
14 DOT, Appendix C, contrary to the ALJ's statement that all jobs cited  
15 are "learnable in less than thirty days with a simple show and do  
16 demonstration." (TR 15). Accordingly, the ALJ erred in failing to  
17 discuss the state agency psychiatrists' opinions and the error was not  
18 harmless. See Stout v. Comm'r Soc. Security Admin., 454 F.3d 1050,  
19 1055-56 (9th Cir. 2006) (reviewing cases where harmless error found and  
20 finding those cases involved ALJ error that was inconsequential to the  
21 ultimate disability determination).

22 Plaintiff also asserts that the ALJ failed to give proper weight  
23 to the opinions of plaintiff's treating psychiatrist, Dr. Nguyen, who  
24 filled out a July 2003 assessment at plaintiff's attorney's request.  
25 (TR 528). Dr. Nguyen essentially opined that plaintiff's mental  
26 impairment precluded her from working. (See TR 569-72). Dr. Nguyen's  
27 opinion is contrary to the opinion of Dr. Smith and Dr. Nguyen's  
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1 assessed limitations are more severe than those assessed by the State  
2 Agency psychiatrist in 2002.

3 A treating physician's opinion generally is entitled to great  
4 weight, but is not "necessarily conclusive as to either a physical  
5 condition or the ultimate issue of disability." Andrews v. Shalala,  
6 53 F.3d 1035, 1041 (9th Cir. 1995) (citation omitted). The weight  
7 given a treating physician's opinion depends on whether it is  
8 supported by sufficient medical data and is consistent with other  
9 evidence in the record. See 20 C.F.R. § 416.927.

10 If the treating physician's opinion is contradicted by other  
11 doctors, as is the case here, the Commissioner may not reject the  
12 opinion without providing "specific and legitimate reasons" for doing  
13 so that are supported by substantial evidence. Rollins v. Massanari,  
14 261 F.3d 853, 856 (9th Cir. 2001) (citation omitted).

15 Here, the ALJ incorporated his prior 2004 decision in which he  
16 found that Dr. Nguyen's 2003 assessment "simply parrots the  
17 [plaintiff's] assertions according to the physician who signed the  
18 forms." (TR 14, 25). In fact, Dr. Nguyen's assessment states that  
19 "MD & pt. completed the questionnaire . . . [plaintiff] responded to  
20 the questions as follows . . . ." (TR 528, 569, 571). The fact that  
21 a doctor's assessment is based on plaintiff's subjective responses to  
22 the questions is a specific and legitimate reason for rejecting the  
23 doctor's opinion where, as here, the ALJ has properly found plaintiff  
24 to be less than fully credible. See Tonapetyan v. Halter, 242 F.3d  
25 1144, 1149 (9th Cir. 2001) (where ALJ properly discounted plaintiff's  
26 credibility, the ALJ was free to disregard examining physician's  
27 opinion, which was premised on plaintiff's subjective complaints).

1 Here, the ALJ found that plaintiff, who is a convicted felon (see TR  
2 618), to be less than fully credible for a number of reasons (see TR  
3 15, 25), a finding which is not challenged here.

4 Moreover, plaintiff's mental health records, which contain a  
5 number of "no-shows" to her appointments (see e.g., TR 529, 538, 539,  
6 549, 557, 645, 649) and refer to her improvement with medication (TR  
7 465, 466, 522, 541, 548, 589, 642, 643, 644, 654), do not indicate  
8 that she has the extreme limitations assessed by Dr. Ngyuen in 2003.  
9 Indeed, at the hearing on March 24, 2004, plaintiff testified that her  
10 medications were working for her and so long as she kept her  
11 appointments with Dr. Nguyen and took her medication, she was "fine."  
12 (TR 674-75; see also TR 681(reporting at her February 2006 hearing  
13 that with the medication her symptoms are "better").

14 Plaintiff refers to the fact that, on May 30, 2002 at a time when  
15 plaintiff was not on medication, a mental health professional gave her  
16 a "current" Global Assessment of Functioning" score of 45, which  
17 indicates serious symptoms.<sup>4</sup> (TR 476, 481). However, the record also  
18 contains a "physician assessment" dated May 30, 2002, which was signed  
19 by Dr. Ngyuen and which assigns plaintiff a GAF score of 55-60,  
20 indicating only moderate symptoms.<sup>5</sup> (TR 475). Moreover, on July 8,

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22 <sup>4</sup>A GAF score between 41 and 50 indicates "[s]erious symptoms  
23 (e.g., suicidal ideation, severe obessional rituals, frequent  
24 shoplifting) **OR any serious impairment in social occupational, or  
25 school functioning** (e.g., no friends, unable to keep a job).  
26 Diagnostic and Statistical Manual of Mental Disorders at 34(4th  
27 ed., Text Revision 2000 (DSM-IV-TR))(emphasis in original).

28 <sup>5</sup>A GAF score between 51 and 60 indicates "[m]oderate  
29 symptoms (e.g., flat affect and circumstantial speech, occasional  
30 panic attacks) **OR moderate difficulty in social occupational, or  
31 school functioning** (e.g., few friends, conflicts with peers or  
32 co-workers). Diagnostic and Statistical Manual of Mental

1 2003, the same day that Dr. Nguyen filled out the assessment at issue,  
2 plaintiff's mental status exam revealed that she was oriented to  
3 person, place, time and situation, her speech was coherent, she was  
4 goal directed, and her appearance was pleasant, clean and casually  
5 dressed. (TR 528). In addition, plaintiff reported only occasional  
6 depressive episodes and anxiety about the disability form for her  
7 social security claim. (TR 528). The ALJ's consideration of Dr.  
8 Nguyen's assessment was free from material error and supported by  
9 substantial evidence.

10 Plaintiff may well be able to work. However, the ALJ failed to  
11 properly consider the assessment of the state agency physicians.  
12 Moreover, while plaintiff's treatment records show that her condition  
13 significantly improves when she is on her prescribed medication, the  
14 medical evidence, including plaintiff's treatment records, which the  
15 consultative examiner did not review, does not "clearly establish"  
16 that plaintiff does not have a severe mental impairment. (See, e.g.,  
17 TR 497 (state agency psychiatrist's rating of functional limitations);  
18 521 (reporting hallucinations "less frequent" on medications but still  
19 present); 541 (reporting fifty percent improvement in visual  
20 hallucinations with medication); 604 (reporting paranoid ideations);  
21 608 (reporting auditory hallucinations)).<sup>6</sup> See Webb v. Barnhart, 433  
22 F.3d at 687. As a result, the ALJ's finding that plaintiff's  
23 impairment was non-severe is not free from material legal error.

24 \_\_\_\_\_  
25 Disorders at 34 (4th ed., Text Revision 2000 (DSM-IV-TR)) (emphasis  
in original).

26 <sup>6</sup>Plaintiff's self-reported past history includes past  
27 suicide attempts (TR 477), hospitalization (TR 338), and severe  
symptoms. (TR 217, 228, 239, 302).

1 Accordingly, remand is warranted.<sup>7</sup>

2 B. Medication Side Effects

3 Plaintiff also alleges that the ALJ failed to properly consider  
4 the side effects of plaintiff's medications.

5 "Passing mention" of side effects of medication in the record  
6 does not require inclusion of side effects in the hypothetical  
7 question posed to the VE. Osenbrock v. Apfel, 240 F.3d 1157, 1164  
8 (9<sup>th</sup> Cir. 2001). Moreover, side effects not "severe enough to  
9 interfere with [plaintiff's] ability to work" are also properly  
10 excluded from hypotheticals to the VE. Id. A proper hypothetical may  
11 exclude limitations claimed by plaintiff but which the ALJ finds do  
12 not exist based on substantial evidence. Rollins v. Massanari, 261  
13 F. 3d 853, 857 (9<sup>th</sup> Cir. 2001).

14 Plaintiff testified at the 2006 hearing that her medications make  
15 her "tired and groggy." (TR 682). However, the ALJ found plaintiff  
16 not fully credible, a finding which, as noted above, plaintiff does  
17 not challenge here. Moreover, plaintiff's treating records repeatedly  
18 state that plaintiff was not experiencing side effects from her  
19 medication, with the exception of isolated instances in which  
20 plaintiff self-reported occasional dizziness, for which she was told  
21 to "change position," and "dry mouth," for which she was directed to

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23 <sup>7</sup>Plaintiff's medical records indicate that she has a history  
24 of drug and alcohol abuse. (See TR 204, 206, 470). A plaintiff  
25 cannot receive disability benefits "'if alcoholism or drug  
26 addition would . . . be a contributing factor material to the  
27 Commissioner's determination that the individual is disabled.'" Parra v. Astrue, 481 F.3d 742, 746 (9<sup>th</sup> Cir. 2007) (quoting 42  
28 U.S.C. § 423(d)(2)(C)). Plaintiff claims to have stopped her  
substance abuse in approximately December of 2001, the month she  
is claiming her disability began. (See TR 541, 654).

1 increase her liquid intake. (See, e.g., TR 464, 521, 522, 524, 526,  
2 528, 541).

3 The ALJ did not materially err in his consideration of  
4 plaintiff's testimony concerning the side effects of plaintiff's  
5 medications and remand is not warranted on this issue.

6 C. Vocational Expert Hypothetical

7 Finally, plaintiff contends the ALJ erred in failing to give a  
8 complete hypothetical to the VE. Specifically, plaintiff contends  
9 that the ALJ failed to include in his hypothetical to the VE the  
10 limitations resulting from her mental impairment assessed by the state  
11 agency physicians and by Dr. Nguyen, and the side effects of  
12 plaintiff's medications.

13 Hypothetical questions posed to the vocational expert must set  
14 out all the limitations and restrictions of plaintiff. Embrey v.  
15 Bowen, 849 F.2d at 422 (emphasis in original). However, a proper  
16 hypothetical question may exclude limitations claimed by plaintiff but  
17 which the ALJ finds do not exist based on substantial evidence.  
18 Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

19 As discussed above, the record does not contain credible evidence  
20 of side effects severe enough to interfere with plaintiff's ability  
21 to work and the ALJ properly rejected the assessment by Dr. Ngyuen.  
22 However, on remand, if VE testimony is necessary, the Commissioner  
23 will have an opportunity to pose hypothetical questions to the VE  
24 after further consideration of assessments by the state agency  
25 physicians and plaintiffs' medical records.

26 REMAND IS APPROPRIATE IN THIS CASE

27 The decision whether to remand a case for additional evidence is  
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1 within the discretion of the court. Sprague v. Bowen, 812 F.2d 1226,  
2 1232 (9th Cir. 1987). Remand is appropriate if the record is  
3 incomplete and additional proceedings would remedy defects in the  
4 Commissioner's decision. McAllister v. Sullivan, 888 F.2d 599, 603  
5 (9th Cir. 1989).

6 Having considered the record as a whole, it appears that the  
7 present record is insufficiently developed.

8 CONCLUSION

9 Accordingly, it is ordered that the matter be **REMANDED** pursuant  
10 to sentence four of 42 U.S.C. §405(g) to the Commissioner for further  
11 administrative action consistent with this opinion.

12 DATED: July 2, 2007

13 CAROLYN TURCHIN  
14 CAROLYN TURCHIN  
15 UNITED STATES MAGISTRATE JUDGE  
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